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JUL 29 2004

OFFICE OF PETITIONS

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In re Application of
Ivri et al.
Application No. 09/551,408
Filed: April 18, 2000
Attorney Docket No. 16770-002721US
Title of Invention: METHODS AND
APPARATUS FOR STORING CHEMICAL
COMPOUNDS IN A PORTABLE INHALER

ON PETITION

This is a decision on the renewed petition under 37 CFR 1.137(a) and the 37 CFR 1.137(b) petition filed July 9, 2004 to revive the above-identified application.

The petition to revive under 37 CFR 1.137(a) is **DISMISSED**.
The petition to revive under 37 CFR 1.137(b) is **GRANTED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned for failure to timely submit a response to the May 5, 2003 Notice of Non-Responsive Amendment hereinafter "Notice" which indicated the February 5, 2003 amendment was not fully responsive. The Notice set a one month period of reply. Extensions of time pursuant to 37 CFR 1.136(a) were not obtained. Accordingly, this application became abandoned on June 6, 2003. A Notice of Abandonment was mailed on December 10, 2003. A petition under 37 CFR 1.137(a) was dismissed on June 7, 2004.

PETITION TO REVIVE UNDER 37 CFR 1.137(a)

A grantable petition under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "avoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

A review of the record indicates no irregularity in the mailing of the Notice, and in the absence of any irregularity in the mailing, there is a strong presumption that the Notice was properly mailed to the address of record. This presumption may be overcome by a showing that the Notice was not in fact received. The showing required to establish the failure to receive an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.² The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Notice may have been lost after receipt rather than a conclusion that the Notice was lost in the mail.

On renewed petition, petitioner has provided a docket report covering August 1, 2003 through August 31, 2003. However, the Notice was mailed on May 5, 2003. Thus petitioner should have submitted docket records covering the time period of May 5, 2003 through June 5, 2003. Furthermore, petitioner has failed to address the fact that the original Notice was mailed to the Townsend Office located in San Francisco, California versus Townsend Denver, Colorado. Petitioner has not provided a statement as to how information and mail is transferred between offices and whether the docket records cover both offices. Accordingly, petitioner has failed to overcome the presumption that the Notice was properly mailed.

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).³

Petition to Revive Under 37 CFR 1.137(b)

A grantable petition pursuant to 37 C.F.R. § 1.137(b) must be accompanied by the required reply, the required petition fee, and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. § 1.137(b) was unintentional. The filing of a petition under 37 C.F.R. § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 C.F.R. § 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 C.F.R. § 1.137(b).

The requirements for a grantable petition under 37 CFR §1.137(b) have been met. This petition is hereby **Granted**.

The application is being forwarded to Technology Center 3700 for further processing.

²M.P.E.P. § 711.03©); See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

³See MPEP 711(c)(III)©(2) for a discussion of the requirements for a showing of unavoidable delay.

Telephone inquiries should be directed to the undersigned at (703) 306-0251.



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